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Chapter 2

WHAT DOES ARTICLE 86 ACTUALLY DO?

Gareth Davies

I. INTRODUCTION

Why is Article 86 in the Treaty? Many universal services, from education to water supply, have traditionally been supplied by public monopolies, or by private supplies within a highly regulated public law framework. Should competition law and free movement apply to such a situation? Is it properly treated as ‘economic’ or as ‘public’? Once upon a time lawyers might have argued this point, and Article 86 served as a rather vague attempt at clarification. On the one hand, Article 86(1) states a sort of obligation; states should not do anything in this quasi public sphere which violates economic law. So at the very least it was always clear that services of general interest were not a walled garden within which states could play whatever protectionist games they wanted. Then on the other hand, Article 86(2) provides a derogation; if economic law imperils the mission of the public service then the mission shall prevail. Economic law will clearly not be allowed to have such a disruptive effect that the public interest is threatened.

It is a messy article, full of ambiguities, which has become redundant, and is now positively malignant. The relationship between services of general interest and economic law is quite clearly defined in the case law on competition and free movement, and Article 86(1) adds nothing but confusion. Furthermore, economic law offers derogations to protect the public interest which are as extensive as those in Article 86(2), making it a superfluous protection. That in itself might not be harmful were it not that the existence of the extra protection encourages a narrow interpretation of the derogations inherent to competition and free movement law, which has wider harmful effects. This is not to mention the confusion that arises when one piles exemption upon exemption.¹ Stating many times that restrictions on economic law are permissible when justified and proportionate – essentially the position in competition law, free movement, and Article 86(2) – does not add protection but just obscures under layers of law the hard factual judgments about proportionality which must be made.

¹ A. Albors-Llorens, ‘The role of objective justification and efficiencies in the application of Article 82 EC’, 44 *CMLRev* (2007) p. 1727 at pp. 1730-1733; G. Davies, ‘Can Selling Arrangements be Harmonised?’, 30 *ELRev* (2005) p. 370; P.-J. Loewenthal, ‘The defence of objective justification in the application of Article 82 EC’, 28 *World Competition* (2005) p. 455 at pp. 459-460; A. Jones and B. Sufrin, *EC Competition Law*, 3rd edn. (OUP 2008) pp. 331-338.

The root of the problem is competition law. Both those hostile to it – from a classical public service perspective – and those immersed in it – the competition clergy – are reluctant to concede that Article 82 especially, and to a lesser extent Article 81, admit exemptions on public interest grounds. Both hold on to an economically untenable separation between maximising the welfare of consumers (done by competition law) and protecting the public interest (done by other rules). On the contrary, the relevance, the importance, of competition law lies in the fact that welfare is defined in terms of subjective preferences; what people want. The premise of competition is that well-functioning markets tend to give them this. Yet if markets do not work well, something which every economist concedes can occur, then there is no competition-based objection to state intervention. Competition says that the pursuit of welfare should be pursued through markets if possible, since well-functioning markets do it best. However if markets do not work then it is better to pursue welfare through other means than to pursue competition at the expense of welfare.

This chapter has three sections. One looks at the obligation apparently imposed by Article 86(1). The second looks at the derogation apparently contained in Article 86(2). The third looks at the broader relationship between competition and public services, and between economic analysis and non-economic interests. Article 86(3) is not discussed. Since it addresses implementation of the first two parts of the article, the arguments below, if correct, diminish its importance significantly. If there is no need to rely on the substance of Articles 86(1) and 86(2) then there is not much need to implement them in legislation.

II. THE OBLIGATION

Article 86(1) is manifestly declarative. It states ‘in the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 12 and Articles 81 to 89.’

This states an obligation on Member States not to violate rules, especially not the rule prohibiting discrimination on grounds of nationality or the rules on competition. It is, on the face of it, superfluous. These rules have direct effect and are binding anyway. If Member States restrict free movement, or discriminate, or assist undertakings in violations of competition law, the Treaty will catch them without any need for Article 86.

Nevertheless Article 86(1) is sometimes thought to have a value resulting from its interaction with the competition rules. In general the duty of loyalty, found in Article 10 EC, requires states not to take measures which ‘may’ facilitate or encourage violations of competition rules by undertakings.² For this to bite it is not neces-

² Case 18/88 *GB-INNO* [1991] ECR 5941, para. 31; Case 267/86 *Van Eycke* [1988] ECR 4769, para. 16; Case C-185/91 *Bundesanstalt für den Güterfernverkehr v. Reiff* [1993] ECR I-5801, para. 14;

sary to show that such violations have already occurred, or even that they will inevitably occur.³ It is enough that states create situations in which undertakings are liable to behave in ways which violate the rules.⁴ Loyalty demands that states maintain a regulatory structure in line with the spirit of competition.

But it is now beyond doubt that for states to be caught by the combination of Article 10 and Articles 81 or 82 there must be a connection between what the state does and prohibited behaviour by an undertaking, albeit that this behaviour may be potential and not yet certain.⁵ What is not caught is the situation where states legislate in a way that restricts competition so that competition-restricting behaviour by undertakings is in fact superfluous.⁶ For example, if the state regulates to impose terms of trade on all undertakings engaged in a particular business, and if these terms of trade are in fact the same as the major undertakings would have liked to impose on the market via a cartel, then the same result is achieved as a (prohibited) cartel. However, because that cartel does not in fact exist, there is no question of any violation by the undertakings, and as a result no question of a violation by the state of Article 81 in combination with Article 10. This may seem odd – that the same competition restricting result is prohibited when it originates with undertakings and is encouraged by the state, but not when it results solely from state measures – but it is unambiguously the law. Similarly, if a dominant undertaking acts to exclude competitors it will probably violate Article 82, and if the state supports this its support will amount to a violation of Article 10 in combination with Article 82. However, if the state simply legislates to give the undertaking a monopoly the same factual result is achieved by state action alone. Since the undertaking has then done nothing wrong itself (although see below⁷ – it is possible to doubt this in some circumstances) there is no violation of Article 82, and as a necessary consequence the state cannot be found guilty of encouraging violations of Article 82, and so will not be found to have infringed Article 82 in combination with Article 10. Under the

Case C-153/93 *Delta* [1994] ECR I-2157, para. 14; Case C-96/94 *Spediporto* [1995] ECR I-2883, para. 20; Case C-35/99 *Arduino* [2002] ECR I-1529, para. 34; See E. Szyszczak, *The Regulation of the State in Competitive Markets* (Hart Publishing, 2007) at pp. 14-15, and pp. 72-73.

³ Case 66/86 *Ahmed Saeed Flugreisen and others* [1989] ECR 803, para. 49; Case C-2/91 *Criminal proceedings v. Meng* [1993] ECR I-5751, para. 22; H. Schepel, 'Delegation of regulatory powers to private parties under EC competition law: towards a procedural public interest test', 39 *CMLRev* (2002) p. 31 at pp. 35-36; Advocate General Jacobs in Case C-67/96 *Albany* [1999] ECR I-5751 at pp. 402-403. Note also that Articles 81 and 82 catch actions whose competitive effects are only potential: Case 123/83 *BNIC v. Clair* [1985] ECR 391; Case T-219/99 *British Airways v. Commission* [2003] ECR II-5917; P.-J. Loewenthal, 'The defence of objective justification in the application of Article 82 EC', 28 *World Competition* (2005) p. 455 at p. 455. The same policy-led pre-emptive approach is taken to free movement. See Case 8/74 *Dassonville* [1974] ECR 837.

⁴ *Idem*.

⁵ Case C-2/91 *Criminal proceedings v. Meng* [1993] ECR I-5751.

⁶ Case C-2/91 *Criminal proceedings v. Meng* [1993] ECR I-5751; Case C-245/91 *Ohra* [1993] ECR I-5851; Case C-185/91 *Bundesanstalt für den Güterfernverkehr v. Reiff* [1993] ECR I-5801; see W. Sauter, 'State and Market' in the competition and free movement case law of the EU courts', *TILEC discussion paper* 2007-24, at pp. 82-87 (available on ssrn.com).

⁷ See *infra* text to nn. 16 et seq.

Article 10 regime, state infringements are dependant upon the potential for independent infringements by undertakings.⁸ Article 10 does not protect competition as such, but simply prevents the state from inciting undertakings to restrict it.

And so back to Article 86(1). There is at least some support for the proposition that this catches state behaviour which restricts competition as such, whether or not there is any (actual or potential) independent violation by an undertaking. If this was so, Article 86(1) would be important, and would extend the scope of the Treaty. However, it is not in fact so.

The idea that it rests almost entirely on two cases, *GB-INNO* and *Corbeau*.⁹ In both of these cases an undertaking was entrusted with a monopoly over a given public service, in the former case telecoms services, and in the latter postage. The core monopoly as such could be justified as necessary to guarantee a universal service, and was not in issue. However its precise scope was challenged in both cases. In *GB-INNO* one of the privileges that the dominant undertaking, the RTT enjoyed, was regulatory authority over telecoms equipment. Anyone wishing to sell telephones on the Belgian market had to have them approved by the RTT, as the network operator. Competitors claimed that granting this power to RTT was in a violation of Article 86(1) since it amounted to an unjustified extension of a dominant position, something which if done by the undertaking itself would be in violation of Article 82. In *Corbeau* it was claimed that the postal monopoly was extended beyond what was justifiable. It included not just the market for regular postal services – where all parties appeared to agree that a monopoly could be justified – but services involving collecting the post from the sender, a clearly more specific, and business-oriented, market. *Corbeau* argued that this extended scope of the monopoly was not justifiable by the need to ensure universal service. He then argued that if the undertaking itself had used its dominant position in the regular postal market to exclude parties from the more specific market, it would have been effectively extending its dominance in an abusive way, contrary to Article 82. Therefore, he said, it followed that state measures achieving the same results – dominance in both markets – were contrary to Article 86(1). Thus in both cases the argument was made that state measures which achieved the same market-closing result as abuse would have achieved were contrary to Article 86(1) even without that abuse actually or potentially occurring. The state's obligation was claimed to be decoupled from that of the undertaking.

The Court appeared to confirm this in both cases, in *GB-INNO* saying that under Article 86(1) states must not 'put public undertakings and other undertakings to which they grant special or exclusive rights in a position which the said undertakings could not themselves attain by their own conduct without infringing Article [82].'¹⁰ It later went on to say that

⁸ See *supra* n. 6.

⁹ Case 18/88 *GB-INNO* [1991] ECR I-5941; Case C-320/91 *Corbeau* [1993] ECR I-2533.

¹⁰ *GB-INNO*, *ibid.*, para. 20.

‘... it is the extension of the monopoly in the establishment and operation of the telephone network to the market in telephone equipment, without any objective justification, which is prohibited as such by Article [82], or by Article [86](1) in conjunction with Article [82], where that extension results from a measure adopted by a State.’¹¹

In *Corbeau* it said ‘the Treaty none the less requires the Member States not to adopt or maintain in force any measure which might deprive [the provisions of Article 82] of their effectiveness’¹² and went on to consider whether the extension of the monopoly could be justified under Article 86(2). It seemed in other words to assume that Article 86(1) applied to the state measure, despite nowhere in the judgment suggesting that the *Regie des Postes* was itself guilty of any abuse.

Yet two points dramatically limit the importance of these cases. One is that they have not been followed on this point. Cases since have maintained the proposition that a Member State will be in breach of Article 86(1) in conjunction with Article 82 ‘only if the undertaking in question, merely by exercising the special or exclusive rights conferred upon it, is led to abuse its dominant position or where such rights are liable to create a situation in which that undertaking is led to commit such abuses.’¹³ There is such a volume of repetition of this proposition, subsequent to both *Corbeau* and *GB-INNO*, that it is almost impossible to seriously argue that these two rather sloppily and ambiguously expressed judgments are authority for a different position.¹⁴

Nevertheless, there is also an interesting secondary argument, which may remove the apparent conflict between these cases and the subsequent ones. It begins with the observation that in both *GB-INNO* and *Corbeau* there were good reasons for finding that the state had in fact created the potential for abuse, and so could have been said to be ‘leading’ the undertakings to abuse. The judgments may not have stated this, but nor did they deny it, and on the facts it is most plausibly the case.

In *GB-INNO* this is so because RTT was placed in a position where it could approve entry to the telecoms equipment market by competitors, something which invites abusive behaviour. This certainly counts as a situation where an undertaking is led to commit abuse. On the facts, *GB-INNO* is a conventional case where the state was aiding and abetting potential abuse by an undertaking. This view is very

¹¹ Para. 24.

¹² Case C-320/91 *Corbeau* [1993] ECR I-2533, para. 11.

¹³ Case C-475/99 *Glöckner* [2001] ECR I-8089, para. 39.

¹⁴ E.g. Case C-41/90 *Klaus Höfner and Fritz Elser v. Macroton GmbH*, [1991] ECR I-1979; Case C-179/90 *Merci convenzionali porto di Genova SpA v. Siderurgica Gabrielli SpA* [1991] ECR I-5889; Case C-69/91 *Decoster* [1993] ECR I-5335; Case C-323/93 *Centre d’insémination de la Crespelle v. Coopérative de la Mayenne* [1994] ECR I-5077; Case C-163/96 *Raso* [1998] ECR I-533; Case C-203/96 *Dusseldorp* [1998] ECR I-4075; Case C-38/97 *Librandi* [1998] ECR I-5955; Case C-115/97 *Brentjens* [1999] ECR I-6025; Joined Cases C-147/97 and C-148/97 *Deutsche Post AG* [2000] ECR I-825; Case C-209/98 *FFAD v. Københavns Kommune* [2000] ECR I-3743; Case C-340/99 *TNT Traco* [2001] ECR I-4109; Case C-475/99 *Glöckner* [2001] ECR I-8089; Case C-49/07 *MOTOE* (Grand Chamber judgment 1 July 2008, nyr).

much supported by comments the Court made later in the judgment, suggesting that this was its primary objection to the situation:

To entrust an undertaking which markets terminal equipment with the task of drawing up the specifications for such equipment, monitoring their application and granting type-approval in respect thereof is tantamount to conferring upon it the power to determine at will which terminal equipment may be connected to the public network, and thereby placing that undertaking at an obvious advantage over its competitors.¹⁵

It was this potential for abuse which really concerned the Court, despite earlier the comments suggesting the contrary.

In *Corbeau* the Regie des Postes was not only led towards abuse by the Belgian state, discussed in the next paragraph, but should probably be seen as having actually abused its position, by encouraging the prosecutor to prosecute Corbeau and intervening in the law suit, including before the Court of Justice, against Corbeau. The Regie was here taking measures, alongside the state, to exclude a competitor. Such measures might be permissible if in a justified cause, but given that the exclusion of Corbeau was found not to be such a cause, they should be seen as abusive.

However, the potential abuse is more interesting, and lies in the possibility which the claimed scope of its monopoly would create for the Regie to enter the market that Corbeau had been active in. The Regie did not claim that what Corbeau was doing – offering a deluxe postal service including collection of post from the sender – was illegal per se, but merely that it, the Regie, had the exclusive right to offer such a service. In fact there is no evidence that the Regie had plans to do so, but the result of the action against Corbeau would have been that the market was exclusively reserved for it should it wish to begin. Had it done so, this would then have been abusive. It was this potential abuse to which the Regie des Postes could be said to be led by its monopoly rights.

The argument that occupying the new market would have been abuse begins with free movement law. When undertakings restrict competition they violate Articles 81 and 82, while when states restrict it they conventionally violate the laws of free movement. The use of Article 10 or Article 86 is unusual. The standard complaint about public measures which make entry to a market harder is that free movement, in this case of services, is being restricted. It may not have been discussed by the Court in the case, but it should be obvious to every first year student of EU law that extending the Regie des Postes' monopoly to cover the services Corbeau wished to offer amounted to a (new) restriction on the provision of postal services, since it prevented foreign postal undertakings from entering an area of the Belgian postal services market.¹⁶ Restrictions on the free movement of services can in principle be

¹⁵ *GB-INNO*, *supra* n. 9, para. 25.

¹⁶ See Case T-266/97 *VTM* [1999] ECR I-2329; Case 229/83 *Au blé vert* [1985] ECR I; Case C-323/93 *Centre d'insémination de la Crespelle v. Coopérative de la Mayenne* [1994]; *Merci Convenzionali*, *supra* n. 14; Case C-309/99 *Wouters* [2002] ECR I-1577; Case C-94/04 *Cipolla* [2006] ECR I-11421; Case 30/87 *Bodson* [1988] ECR 2479; *GB-INNO*, *supra* n. 9; Case C-415/93 *Bosman* [1995] ECR I-4921; Case C-277/91 *Ligur Carni* [1993] ECR I-6621. See also the Opinion of A.G. Bot

justified, and the need to maintain a universal service is certainly a good justification in principle.¹⁷ However, in the case it was suggested that in fact this justification did not suffice – the restriction was not necessary at all. In that case the state extension of the monopoly was contrary to both Articles 49 (services) and 43 (freedom of establishment) and illegal quite without any need to consider the competition rules or Article 86.

The next step in the argument is to suggest that the voluntary use of privileges granted in violation of Community law, in order to extend a dominant position, should be seen as abusive. Applying that to the case in hand would mean that if the *Regie des Postes* were to take advantage of the exclusion of *Corbeau* and others of his ilk, to take exclusive occupation of that secondary market, this would be a violation of Article 82. It would have the necessary ingredients; voluntary action by the undertaking, the extension of market dominance to a new market, and wrongfulness, this latter because the possibility for the extension arises from illegal state action which is being exploited. Is it strange to suggest that if states have the obligation under free movement law not to allocate markets without justification, dominant undertakings have the obligation not to collaborate with them in such illegal allocation?¹⁸

The consequence of such an approach is that *Corbeau* is far more orthodox. If the *Regie des Postes*' action is abusive, then making it possible is a quite conventional violation of the state's responsibilities under either Article 86(1). *Corbeau* is then no authority for the proposition that state liability under Article 86(1) is decoupled from actual or potential abuse by an undertaking. At most it may suggest that Article 86(1) goes beyond 'leading' an undertaking to abuse and includes also 'creating a situation where an undertaking is liable to abuse its dominance.' However, that simply means that Article 86(1) is coextensive with the obligation resulting from Articles 10 and 82 together.¹⁹

In conclusion, there is no convincing reason to think that Article 86(1) prohibits anything that is not already prohibited by Article 10 combined with the competition articles. Article 86(1) looks as redundant as its plain language suggests it should be. The only counter-argument is based on an interpretation of two ambiguous cases which (a) ignores their facts, and (b) ignores the clearly stated contrary position of the Court in all cases since.

in Case C-446/05 *Doulamis* [2008] ECR I-1377, but c.f., the Court in the same case mysteriously ignoring his orthodox free movement argument, no doubt for reasons of judicial economy (the question was not actually asked by the national court).

¹⁷ Case C-55/94 *Gebhard* [1995] ECR I-4165; Case 120/78 *Cassis de Dijon* [1979] ECR 649.

¹⁸ See W. Sauter, 'State and Market', *supra* n. 6, pp. 104-106; Case C-198/01 *CIF* [2003] ECR I-8055; Case C-359/95 P *Ladbroke* [1997] ECR I-6265; J. Temple Lang, 'Privatisation of social welfare: EU competition rules' in M. Dougan and E. Spaventa, eds., *Social Welfare and EU Law* (Hart 2005) at pp.55-59.

¹⁹ See n. 4 and accompanying text *supra*.

III. THE DEROGATION

Article 86(2) attracts more attention than the preceding sub-article. It is perceived by many as the saviour of public services, guaranteeing the primacy of the public mission over the brutal demands of economic liberalism. However it will be argued below that, as with Article 86(1), it adds nothing to what is already inherent in economic law itself.

Article 86(2) states that ‘undertakings entrusted with the operation of services of general economic interest ... shall be subject to the rules contained in this Treaty, in particular to the rules on competition, insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.’ The first part of this makes clear that being entrusted with the operation of an SGEI is not in itself a reason to claim the Treaty does not apply. However, this is old news – long established by the Court without any need to refer to Article 86. The special nature of certain services does not exclude them from the scope of the Treaty, if they are in fact economic in nature or organisation.²⁰

The second part of the first sentence of Article 86(2) however suggests that economic law only applies insofar as it does not render the public service task impracticable. Since it is precisely the perception of many working at national level that competition and free movement are a spanner in the works of traditional SGEI provision mechanisms, this seems to be important. It could offer a restriction on the application of the rules on state aid, free movement rules, Article 81, and, most importantly, Article 82.

The first three of these can be dealt with quite briefly and simply. As regards state aid it is clear since *Altmark* that a fair price paid for defined services does not constitute aid.²¹ Thus if the state wishes to pay an undertaking to provide a universal service, or to provide a service to those who cannot pay for it themselves, provided it states clearly what exactly is to be provided and what exactly is to be paid, and the rates are not above normal market ones, state aid rules are not a problem. Thus Article 86(2) would only be useful if a state wished to move money towards an undertaking in some ambiguous and undefined way, or if it wished to pay more than was actually necessary to provide the services – if it wished to turn on the cash tap to provide open-ended support for the undertaking, as has so often been the tradition in Europe. Yet this behaviour would not survive Article 86(2) either.²² The

²⁰ Case C-158/96 *Kohll* [1998] ECR I-1931; Case C-157/99 *Smits and Peerbooms* [2001] ECR I-5473; Case C-41/90 *Höfner u. Elsnher v. Macrotron GmbH* [1991] ECR I-1979

²¹ Case C-280/00 *Altmark* [2003] ECR I-7747.

²² The rather odd Commission decision on the application of the state aid rules to SGEI (2004/842)EC states, correctly, that it only applies to payments not meeting the *Altmark* criteria, and thus falling within the state aid rules. However it then sets conditions for the legality of such payments that are substantially identical to the conditions in *Altmark*. Since the decision exempts such payments from notification, it is more a clarification and enactment of *Altmark* than an addition to it.

Court has interpreted this article, quite reasonably, to mean that state behaviour which would normally violate the Treaty, but is necessary to maintain the public service task, is permitted.²³ There is therefore a necessity requirement. The degree of judicial scrutiny of necessity is variable and not always intense,²⁴ but it is not controversial that funding on an open-ended or undefined basis, in excess of fair or market rates for the service in question, would be found to exceed what is necessary. There are good reasons for states to purchase services on behalf of the population as a whole or segments of it, and the state aid rules do not inhibit this. There are not, generally, good reasons for states to provide solvency guarantees to undertakings,²⁵ and even Article 86(2) would not save these. None of which is to exclude that were a major SGEI undertaking to teeter on the edge of failure, with potential consequences for the availability of the service, the state might be permitted to step in and take emergency measures. However, this is because the rules on state aid envisage such a situation and provide for it.²⁶ Article 86(2) remains an irrelevance.

Nor is it important in the context of free movement. For decades it has been clear that these rules do not consist of absolute prohibitions, and state measures which restrict, for example, the free movement of services are nevertheless permitted if they are justified by a legitimate goal and proportionate, which is to say that they are genuinely necessary to meet a legitimate goal.²⁷ It hardly needs saying that the desire to ensure important public services are available to all on accessible terms is a legitimate goal, and it is almost inconceivable that the Court would find otherwise. So any necessary measures will not violate the free movement rules anyway, and will not need the assistance of Article 86(2).

Competition law is a little more complex, and there are many who would argue that Article 81 should catch all agreements restricting competition, even if they are necessary for the provision of an SGEI. This is not such an uncommon situation. For example, in the context of health care providers are often encouraged to work together to agree protocols, procedures, or tariffs, to ensure that even within a framework of some competition patients receive equality of treatment and price competition does not destabilise expensive infrastructures. It is the norm in many public services – also education for example – that competition between providers is limited by regulatory limits on the nature or cost of the products that can be offered, and that in determining what those limits should be the providers themselves, as the technical experts, play a role, via representation in regulatory committees or authorities. An agreement restrictive of competition, but in a good cause, thus.

Nevertheless, while some consider that the good cause is irrelevant and the purity of competition law demands that such agreements nevertheless fall within Ar-

²³ Case C-320/91 *Corbeau* [1993] ECR I-2533; Case C-157/94 *Commission v. Netherlands* [1997] ECR I-5699; *Albany*, *supra* n. 3; *TNT Traco*, *supra* n. 14.

²⁴ See *infra* section IV.3, 'Proportionality'

²⁵ See Case C-83/01 P *Chronopost* [2003] ECR I-6993. See also A.G. Jacobs in Case C-126/01 *GEMO* [2003] ECR I-13769 at pp. 110 et seq.

²⁶ See E. Szyszczak, *supra* n. 2, at p. 196.; Art. 87(3)(e).

²⁷ Case C-55/94 *Gebhard* [1995] ECR I-4165; Case 120/78 *Cassis de Dijon* [1979] ECR 649.

ticle 81 the Court has consistently found to the contrary.²⁸ Its view is that insofar as providers make agreements in their own interests, not at the request of the state, and/or unconstrained by regulation limiting the terms of the agreement, they are indeed violating Article 81. However, insofar as co-operation between providers is at the behest of the state, which for example entrusts them with a regulatory role, and insofar as that co-operation is constrained by law to be in the public interest rather than in the interest of the providers, it falls outside Article 81. Thus in *Albany* the Court found that agreements between undertakings concerning pensions were not prohibited by Article 81 because they were necessary for a legitimate social purpose, even though they inevitably had a certain competition-restricting effect. Similarly, in *Wouters*, the leading case, bar council rules which once again did restrict competition, and did amount to an agreement between undertakings, were nevertheless not prohibited by Article 81 because they were necessary for the proper regulation of the legal profession, and the restriction of competition that was entailed was no more than was inherent in the regulatory role.²⁹ Then subsequently in *Meca-Medina* the Court found that sporting rules agreed between commercial sport organisations, even though they did restrict competition, were outside Article 81:

‘... even if the anti-doping rules at issue are to be regarded as a decision of an association of undertakings limiting the appellants’ freedom of action, they do not, for all that, necessarily constitute a restriction of competition incompatible with the common market, within the meaning of Article 81 EC, since they are justified by a legitimate objective.’³⁰

The clear line running through all these cases is that agreements between undertakings which do restrict competition are nevertheless not within the Article 81 prohibition if they are limited to what is necessary to serve a legitimate objective, be that proper regulation of the professions, the proper conduct of sport, or social policy. The Court has not spelled out in so many words which objectives it would consider legitimate in this context but it is hardly controversial to suggest that it is public interest objectives that it has in mind, rather than objectives serving the interests of the undertakings in question. That fits not only the results of the cases but common sense too. The difference between public interest and self interest is the difference between delegated regulation and simple commercial conspiracy. Hence in *Wouters* the Court said that if

‘a Member State, when it grants regulatory powers to a professional association, is careful to define the public-interest criteria and the essential principles with which its rules must comply and also retains its power to adopt decisions in the last resort ...

²⁸ Cases *Wouters*, *supra* n. 16; *Albany*, *supra* n. 3; *Brentjens*, *supra* n. 14; *Librandi*, *supra* n. 14; Case C-219/97 *Drijvende Bokken* [1999] ECR I-6121.

²⁹ Case C-309/99 *Wouters* [2002] ECR I-1577; See also R. Whish, *Competition Law*, 5th edn. (Butterworths 2003) pp. 121-122.

³⁰ Case C-519/04 P *Meca-Medina* [2006] ECR I-6991, para. 45.

[then in that case] the rules adopted by the professional association remain State measures and are not covered by the Treaty rules applicable to undertakings.³¹

On the facts this was not quite the situation so the principle was not directly applied. However, it is clearly the fact that agreements are constrained to what is necessary to serve the public interest which takes them, for the Court, outside the cartel prohibition. It has integrated the balancing work to which Article 86 pretends into the scope of application of Article 81.

It follows that as a result of this case law Article 86(2) is irrelevant to agreements between undertakings in the context of SGEI. Where they are necessary for public interest objectives they will fall within the *Wouters* exemption anyway. If they are not necessary, then they are self serving and Article 86(2) will not protect them.

It is however Article 82 where Article 86(2) seems to have its most significant application. It is commonly argued that the concept of an abuse of a dominant position is ‘objectively’ defined in a way that does not admit of justifications.³² It is defined purely by reference to the effect of the action on the market structure and/or on competitors, with the result that any saving justification for the behaviour in question must be external to Article 82.³³ Hence the apparent importance of Article 86(2).

In fact neither the Court nor competition theory support this rigid approach to Article 82. The relevant cases fall into two groups. On the one hand there are a number of cases, widely discussed, in which the Court concedes that it is impossible to define ‘abuse’ purely by reference to effects.³⁴ For example, an excellent advertising campaign may lead to increased market share and the bankruptcy of a competitor, whereas a refusal to supply vital components to that competitor might have a similar effect. Yet the latter is manifestly abusive whereas the first is not. Similarly, pricing below cost may be abusive, but increased efficiency so that prices can be reduced while still making a profit is not abusive, yet the actual price level and market effects may be the same. Common sense dictates that in determining abuse neither the effect on the market, nor the nature of the action in itself are sufficient. It is necessary to look at how that effect is achieved, and why that action is taken. Yet if the reasons and causes behind an action or effect matter, then this is equivalent to saying that Article 82 is not purely effects-based, but that justifications, of at least some types, are available.³⁵ An action may be found not to be abuse if it can be shown that it was the result of internal efficiency, or constituted

³¹ Para. 68.

³² See, e.g., B. Sher, ‘The last of the steam-powered trains: modernizing Article 82’, *ECLR* (2004) p. 243; A. Albors-Llorens, ‘The role of objective justification and efficiencies in the application of Article 82 EC’, 44 *CMLRev* (2007) p. 1727; D. Chalmers, *European Union Law* (Cambridge University Press 2006) at pp. 1064-1067.

³³ Albors-Llorens, *ibid.*, pp. 1734-1735; Loewenthal, *supra* n. 3, pp. 459-466.

³⁴ See the discussion in Albors-Llorens, *supra* n. 32; Loewenthal, *supra* n. 3; G. Monti, *EC Competition Law* (CUP 2007) pp. 203-211.

³⁵ T. Eilmansberger, ‘How to distinguish good from bad competition under Article 82 EC: in search of clearer and more coherent standards for anti-competitive abuses’, 42 *CMLRev* (2005) p. 129.

normal business conduct.³⁶ The absoluteness of the more formalistic readings of Article 82 is untenable.

But then the question is ‘exactly what kinds of reasons or justifications may save actions from being classified as abuse?’ Here two other cases are important, *Hilti* and *Tetrapak*.³⁷ In both of these the Court conceded that actions which would normally be abuse might not be if they were necessary for legitimate public policy reasons – the issue in question was whether a refusal to supply certain goods could be justified on grounds of health and safety. The companies lost their argument on the facts because they simply could not show that this was the real reason, or an adequate reason in the circumstances, for their action. This was particularly so because they had undertaken their protective actions without being asked to by the public authorities, and without asking the public authorities. Quite rightly the Court considered that one must be skeptical of claims by commercial organisations to be acting in the public interest on their own initiative.

However, the principle remains. It emerges clearly from both judgments that the failure was on the facts, not because public policy could not be a defence to Article 82. It seems quite plausible to suggest then that if an undertaking engages in actions which amount to an extension of a dominant position, but they do so at the request of the state, and the action is necessary to ensure the universal availability of an SGEI, then this would meet the doubts expressed in *Hilti* and *Tetrapak* and rebut a claim of abuse. The most plausible position on the basis of the cases so far is that actions otherwise abusive are rendered not so if they are legitimately and proportionately undertaken because necessary to fulfil a state-entrusted public service mission. So who needs Article 86(2)?

Aside from the case law support, any other position would be illogical and conflict with the language of the Treaty. Do we really want to back ourselves into the position of claiming that actions vital to ensuring the public have access to healthcare, water or education constitute abusive behaviour? We do violence not only to language and the clear intention of the Treaty – abuse is hardly a neutral word and can not have been intended to catch beneficial, necessary and desired actions undertaken at the request of public authority – but to logic too. For it turns out that if public policy is irrelevant to abuse, then this renders the definition of abuse irrelevant to policy – and so makes Article 82 as a whole a rather trivial piece of law.

IV. THE BROADER RELATIONSHIP BETWEEN COMPETITION AND PUBLIC SERVICES

IV.1 Abuse, welfare and the public interest

There is something close to a consensus amongst European competition lawyers that competition law should primarily aim to promote the welfare of consumers.³⁸

³⁶ n. 33 *supra*.

³⁷ Case T-30/89 *Hilti* [1991] ECR II-1439; Case T-83/91 *Tetrapak* [1994] ECR II-755.

³⁸ See G. Monti, *supra* n. 34 at pp. 82-86; T. Eilmansberger at pp. 132-140; D. Gerber, *Law and Competition in Twentieth Century Europe – Protecting Prometheus* (OUP 1988).

There is not always agreement on how this should be defined, but it is mainly contrasted with the protection of competitors, which is seen as, on the whole, old-fashioned and undesirable. If action is taken to prevent dominant companies from crushing competitors it is not for the sake of those competitors as such, but because the consumer is thought to be ultimately harmed by the diminished competition.

There is also, among those competition lawyers, a dominant, probably majority, view that the effects on consumer welfare should not be assessed in some general, political sense akin to ‘what do we think is good for the consuming public,’ but in economic terms, according to rules and theories of economics, albeit that there is not always agreement on exactly which rules or theories should be used.³⁹ It is hoped that such a resort to economics simultaneously ensures that competition law actually promotes wellbeing, and does not simply become a tool of industrial policy, while also promoting legal certainty, since economics, some claim, is clearer and more consistent than unscientific policy judgments about what is a good idea.

However one does define welfare, a central aspect is inevitably that it must reflect subjective preferences. Economics is value-neutral in the sense that it does not work with ‘objective’ ideas of value, but accepts that value is defined by preferences. If people think Nike trainers are worth 200 euros, then indeed so they are. To talk of maximising ‘welfare’ in economics is not to talk of maximising educational level or health or income or television size, but maximising the things that people want. Our welfare is increased as our access to things and services approaches the state that we ourselves would consider to be ideal, however odd that ideal might seem in the eyes of others.

The best way of achieving this maximisation of welfare is then taken to be through the existence of working competitive markets. The premise of competition law is that such markets are a better, more efficient way of maximising welfare than centralised allocation of goods and services would be. If a market works well, then any interference in it only has the effect of reducing total welfare.⁴⁰ This must be nuanced in the European context where consumer welfare is preferred to ‘total welfare’ as a goal of policy,⁴¹ but nevertheless it is taken to be the case that consumer welfare will be generally better served by competitive markets than central control. Hence the law legislates for free competition, and restricts the capacity of states to limit this. More to the point here, it also, via Articles 81 and 82, restricts the capacity of undertakings to limit competition. Articles 81 and 82 are intended, nowadays, to prevent behaviour by undertakings which limits competition to the detriment of consumer welfare. An economic approach to ‘abuse’ under Article 82 would then consider it to be behaviour which leads to a reduction in consumer welfare, meaning a reduction in the degree to which consumers get what they want. There are many arguments to be had about the precise nature of most of the terms in that sentence, but the general idea is uncontroversial.

³⁹ Monti, *idem*.

⁴⁰ See R.H. Bork, *The Antitrust Paradox* (Free Press 1978) at p. 52, cited and discussed in Monti, *supra* n. 38 at p. 55.

⁴¹ Monti, *supra* n. 38 pp. 80-82.

This approach to Article 82 means that it does not impact on actions necessary for an SGEI mission since such actions are based on two premises: (a) the market is not working, and is not capable of delivering what consumers want and (b) action apparently restricting competition in fact, because of the dysfunctional nature of the market, increases the wellbeing of the consumers of the relevant services. In essence, where SGEI's are involved, it is usually the case that without public intervention some potential consumers are unable to get any services, and most consumers are unable to get exactly the services they want because there are aspects of service provision such as security and supply and equality of supply which are important to consumers but which markets appear to be unable to deliver, at least within the behavioural limitations that law and the state in general impose.⁴²

The simplest way of putting things would then be to say 'it is a premise of SGEI-related measures that they increase the welfare of the consumers of the services. That is why the state authorises them. Hence it is nonsensical to call them abuse, because abuse is defined as action which decreases welfare. The action may be of a sort which would normally be abuse, but that assumes that it takes place in a normal competitive markets. Since SGEI markets are normally dysfunctional, because of the complicated nature of the services and of the desires of the consumers, action that looks at first glance abusive may well turn out to be welfare-enhancing. Measures which are inefficient when the sun shines may by contrast be very efficient when the rain starts.'

Thus if an SGEI measure increases welfare in the sense that it increases the degree to which consumers get what they want, Article 82 could be used in one of two ways. Either one could concede that this is one of those situations where market failure means welfare is served by unorthodox approaches, that the measure is welfare-enhancing, and so is not abuse. This would maintain the economic, effects-based, realistic approach to Article 82, and continue to try and use it as a tool of welfare-enhancement. Or one could insist that 'welfare' as used in competition law can only take account of preferences which the market in its current form is capable of satisfying, and those which it cannot are to be ignored. In that case the action would continue to be abuse, and Article 86(2) would be necessary. However, in that case 'welfare' would not longer be a proxy, or even necessarily an indicator, of whether people are getting what they want. It would have become an index of its own, divorced from the broader goal of welfare in a true sense. There is no obvious policy reason for wanting to pursue such welfare, and certainly not at the expense of 'true' welfare. If Article 82 does not take account of policy, then it becomes a rule not worth having.

⁴² W. Sauter, 'Services of general economic interest and universal service obligations as an EU law framework for curative health care', *TILEC discussion paper* 2007-29; G. Davies, 'The process and side-effects of the harmonisation of European welfare states', *Jean Monnet Working Paper* 02/06, available on ssrn.com.

IV.2 Undertakings as state agents

Competition law is in a sense struggling with issues which the Treaty and the EU have already resolved. The tension between market freedom and regulation is not to be resolved in favour of one side or the other, but is an ongoing balance. Markets contribute to social contentment, but so do market restrictions in the form of law. Hence while the EC Treaty reflects a positive view of competition and markets, it does not impose any general requirement that states only regulate in demonstrably quantifiably efficient ways. The assessment of which laws improve the general good continues to be, often, too subtle and complex for economics, and remains within the political domain.

When undertakings act as agents of the state, there is no particular reason to treat their actions differently. SGEI measures taken by an undertaking, but which fall within the remit of a public mission entrusted to that undertaking, should not even really attract the attention of Article 82. The undertaking is here acting on behalf of public authority, and should be held to the same standards as public authority – those of free movement law, and of Article 10. The only reason to diverge from this would be if there is some principled reason to discourage states from co-operating with undertakings in this way.

It is hard to see what that reason would be, and it would be regressive were it to exist. The interactive partnership between states and private undertakings in the general good is a very European development, and one at the heart of the continental European social-market model. It is a rejection of the hard division between public and private, or state and market, or economic and non-economic interests which has caused so much conflict both on the global scale and within nations. It has been adopted by the EU, and among policymakers as within society seems firmly entrenched. There is little call for state control of economic life, but nor for deregulation of sensitive public services. co-operation between public regulators and private providers is Europe's preferred path, and such co-operation inevitably entails a degree of decentralisation of decision-making. The test then should not be whether the resulting measures are abuse, since they are not adopted in the commercial pursuit of market success, not *qua undertaking*. The test should be that normally applied to market-restricting regulation – whether it is proportionate.

IV.3 Proportionality

There is an argument that the importance of Article 86(2) lies in the standard of review that it entails.⁴³ The fundamental question in the context of Articles 81, 82, free movement, of Article 86 is whether a measure is in fact necessary to achieve important and legitimate SGEI goals, or whether it goes further than necessary. This is usually wrapped in the Community law language of proportionality. However, it is possible to engage in intense and skeptical review of the necessity of a

⁴³ See Sauter, *supra* n. 42.

measure, or to take the state's word at face value, or to adopt all intermediate positions. Article 86 is sometimes thought to entail a somewhat more relaxed and hands-off standard of review than other contexts.

This perception is based largely on the Court's repeated statement that states are not required to show that no other less restrictive way of meeting their goals would be possible.⁴⁴ Showing that there is no alternative policy is a very difficult challenge to meet, and would make SGEI measures hard to sustain. It is understandable that the Court is often satisfied with evidence that a measure is a necessary element of the existing SGEI system; that simply removing that measure would place provider undertakings in a financially unacceptable position.⁴⁵ It seems as if respectful pragmatism rules.

However, there is no reason to think that the position would be any different were free movement or competition law applied. Although, as argued above, it probably should not, the Court does consider many SGEI cases under Article 86. But if it did not it would still be faced with the same factual and policy assessments, and would still be forced into the same approach to proportionality. Its deference to states is not because of Article 86, but because these are factually complex and value-laden areas in which the sensitivity of the subject matter and the limited nature of the adjudicatory role makes it inappropriate for judges to second guess policy-makers. All they can do is engage in a fairly marginal review.

There is nothing in free movement or competition law to suggest that this would be problematic. Within these contexts the intensity with which proportionality is applied varies widely, according to the nature of the facts.⁴⁶ Where they are reasonably simple and sensitive policies are not in issue, the Court delves. Where whole social systems may be upset, it defers. Proportionality, the scholars agree, is a principle whose application varies with the factual context.⁴⁷ An SGEI will remain an SGEI whatever Treaty article encompasses its legality, and the underlying questions will remain the same too. So, the evidence from the case law suggests, would the standard of review.

V. CONCLUSIONS

There is a potentially unhealthy alliance between competition lawyers fighting a rearguard action against contamination by qualitative reality, and public service

⁴⁴ Case C-320/91 *Corbeau* [1993] ECR I-2533; Case C-157/94 *Commission v. Netherlands* [1997] ECR I-5699; Case C-158/94 *Commission v. Italy* [1997] ECR I-5789. The position is not entirely consistent however: c.f., e.g., Case C-203/96 *Dusseldorp* [1998] ECR I-4075; Case C-209/98 *Sydhavnens* [2000] ECR I-3743.

⁴⁵ See, e.g., Case C-320/91 *Corbeau* [1993] ECR I-2533; Case C-115/97 *Brentjens* [1999] ECR I-6025; Case C-67/96 *Albany* [1999] ECR I-5751; Case C-340/99 *TNT Traco* [2001] ECR I-4109.

⁴⁶ G. de Burca, 'The Principle of Proportionality and its Application in EC Law', 13 *YBEL* (1993) pp. 111-112; See J.H. Jans, 'Proportionality revisited', 27 *LIEI* (2000) p. 239; G. Davies, 'Abstractness and concreteness in the preliminary reference procedure', in N. Nic Shuibhne, ed., *Regulating the Internal Market* (Edward Elgar 2006).

⁴⁷ *Idem*.

administrators wishing to fence their world off from the complexities of economic policy. Neither feels much enthusiasm about talking to the other. Yet talk they must, if policy is to be well-made, and that dialogue should be embedded in the law too. A realistic and non-formal approach to economic law demands that it prohibits undesirable measures, and that good reasons to adopt a measure are also good legal reasons to permit it. In particular, if a measure serves the preferences of the population then the most passing respect for economics demands that we do not classify this measure as welfare-reducing. Yet that means policy justifications are internal to Article 82, just as they unequivocally are to Articles 81 and free movement. And this leaves Article 86 as an unnecessary Cassandra, promising protection from threats that do not exist, slandering economic law with the implication that it takes no account of the public interest, and trying to recreate old divisions between the economic and the social. The Treaty, and society, would be better if it was gone.